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ARIZONA ATTORNEY GENERAL

February 21, 1984

James G. Ricketts, Ph.D., Director
Arizona Department of Corrections
321 West Indian School Road
Phoenix, Arizona 85013

Re: I84-028 (R83-184)

Dear Dr. Ricketts:

By your letter dated December 12, 1983, you requested an opinion explaining and interpreting the computation of parole eligibility, mandatory release, and release credits for offenders sentenced pursuant to A.R.S. §§ 28-692.01(F) and 28-692.02. It would be inappropriate for us to comment on the legality of any particular sentence imposed by the courts and, therefore, we decline to do so. Our response will generally address the sentencing provisions of the aforementioned statutes.

A.R.S. § 28-692.01(F) provides in pertinent part:

If a person is convicted of a third or subsequent violation of § 28-692 within a period of sixty months, the person is guilty of a class 5 felony and shall not be eligible for probation, pardon, parole, commutation or suspension of sentence or release on any other basis . . . until the person has served not less than six months in prison.

(Emphasis added.) Similarly, A.R.S. § 28-692.02(A) provides:

A person whose operator's or chauffeur's license is suspended, cancelled, revoked or refused and who commits an offense in violation of § 28-692 during the period of such suspension, cancellation, revocation or refusal, or a person who has never applied

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for or obtained such license after suspension, cancellation, refusal or revocation pursuant to § 28-691 or § 28-692.01, who commits a second offense in violation of § 28-692, is guilty of a class 5 felony and shall be sentenced to serve not less than six months in prison. A judge shall not grant probation, pardon, parole, commutation or suspension of sentence or release on any basis, except upon the condition that the person serve not less than six months in prison.

(Emphasis added.)

A.R.S. §§ 28-692.01.F_x and 28-692.02.A_x thus impose a mandatory, flat, six month prison term as a part of any greater prison term imposed and exclusive of the terms of any probation. If probation is not imposed, the six month term must be served before the person is eligible for pardon, parole, commutation or suspension of sentence, or release on any other basis, except as specifically authorized by § 31-233 A. and B. A.R.S. § 28-692.01.F. For example, if the court imposes the presumptive two year term for a class 5 felony, the offender must serve six months of the two year term before he may be considered eligible for parole or mandatory release. Likewise, while there is nothing in this statute to prevent the offender from earning release credits while serving this six month term, those credits may not be used to reduce the offender's six month term.

This interpretation is consistent with the court's analysis of A.R.S. § 28-692.02 in State v. Benally, Ariz., 669 P.2d 1030 (Ct.App. 1983), in which the court acknowledged that A.R.S. § 28-692.02.A. mandates a six month prison term as a condition^{or} (or part of) any other possible sentence the trial judge may "legitimately impose for a class 5 felony. Although worded slightly differently, A.R.S. § 28-692.01.F. contains the same operative language and similarly mandates a six month flat prison term as a condition precedent or part of any other penalty applicable to a class 5 felony.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General